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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 205–213) is reported at 397 F. 2d 157. The decision and order of the National Labor Relations Board are reported at 164 NLRB No. 49 (R. 166–204).

JURISDICTION

The judgment of the court of appeals (R. 213) was entered on July 3, 1968. The petition for a writ of certiorari was filed on September 28, 1968, and granted on December 16, 1968 (R. 214). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 43–44.

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's statements in this case contained threats of reprisal and therefore constituted restraint or coercion of employees in violation of Section 8(a)(1) of the National Labor Relations Act.

2. Whether, irrespective of other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Sinclair Company produces mill rolls, wire, and related products at its two plants in Holyoke, Massachusetts. From 1933 until 1952, the Company's journeymen and apprentice wire weavers were represented by the American Wire Weavers Protective Association. In 1952, the Company was shut down for about three months as the result of a strike over contract negotiations; it subsequently reopened without a union contract. In 1964, the Company was acquired

[1] This issue is the same as that presented in *National Labor Relations Board* v. *Gissel Packing Co.*, and *Food Store Employees Union* v. *Gissel Packing Co.*, Nos. 573 and 691, this Term.

by, and became a division of, the Lindsay Wire Weaving Company of Cleveland, Ohio. David Sinclair, son of the Company's founder, continued as president of The Sinclair Company. (R. 167, 169–171; 94–95.)

Early in July 1965,[2] the International Brotherhood of Teamsters, Local Union No. 404 began an organizing campaign among the Company's Holyoke employees. The Union sent each employee a letter, in which it stated the benefits it had achieved for its members in the wire weaving industry and enclosed an authorization card.[3] The letter also stated: "If you do have an interest in our organization, please sign the enclosed authorization card which will permit us to represent you in collective bargaining when a sufficient number of you have signed" (R. 168; 108–110). The Union obtained authorization cards from 11 of the Company's 14 journeymen wire weavers.[4]

[2] All dates hereafter are in 1965.

[3] The card, in relevant part, authorized the Union to represent the employee "for the purpose of collective bargaining and to negotiate a union security shop and membership fees deduction contract with my employer," and also contained an application for "membership in the above Union" (R. 110).

[4] The validity of the authorization cards is not in dispute. At the Board hearing, 11 employees authenticated their own signatures on the authorization cards (Tr. 12, 26, 29, 35, 39, 64, 69, 72–73, 77, 88, 196–197), and Company counsel stated that he had no objections to 8 of these 11 cards (R. 190). The Company filed no exceptions to the Trial Examiner's acceptance of the cards signed by Brunsault (who testified that he executed and mailed an undated card between July 6 and July 9) and Goulet (who testified that he filled out and dated his card) (R. 190–191; 27–29). The Company did except to the Examiner's action in counting the card executed by employee Dean, who signed a card which his wife and son later mailed without his specific instruction. The Examiner counted Dean's card on the ground that he had never sought to retrieve or revoke it (R. 191; 24–26).

On September 20, the Union wrote President Sinclair that "the majority of your journeymen-wire weavers and apprentices at your Holyoke, Massachusetts location have designated this Local Union * * * as their collective bargaining representative." The Union requested that the Company bargain with it and offered to submit the signed authorization cards to a mutually agreed upon neutral party for authentication. (R. 168; 115–116.)

On September 28, President Sinclair wrote denying the request "(a) because the Company has a good-faith doubt that Local 404 * * * represents an uncoerced majority of its weaving department employees, (b) because * * * authorization cards are unreliable as a means for determining a union's majority status, and (c) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board." He suggested that the Union seek an election (R. 168, 118–119). The Union then petitioned for an election in a Company-wide unit (R. 147–149, 158–159) but on November 8, withdrew this request and sought instead an election among the journeymen wire weavers at the Holyoke plant; the parties subsequently stipulated that this was an appropriate unit for collective bargaining purposes (R. 156, 161, 168–169). The election was held on December 9 (R. 166).

When President Sinclair learned of the union organization effort at its inception in early July (R. 171), he talked with all his employees in an effort to combat it (R. 172, 34). In his meeting with the wire

weavers, he reminded them of the 1962 strike which "almost put our company out of business," and expressed disappointment that they were forgetting the "lessons of the past." He stated that the Company had been on "thin ice" since the strike, that its acquisition by Lindsay gave it a "second chance," but that Lindsay expected the Company to make a profit and otherwise would not support it (R. 172–173; 35–36). He added that contract negotiations with the Union could lead to a strike, because "If a Union made unreasonable demands on our company that we couldn't meet * * * the union would strike us," since "the union's only weapon is to strike" (R. 172; 36, 43); and that a strike "could lead to closing the plant"—the Holyoke operation was not necessary to "the successful operation of the total [Lindsay] company" because Lindsay had facilities elsewhere, in Mississippi and Ohio (R. 43–45, 49). He also noted that the wire weavers would have difficulty obtaining other jobs because they were a small craft, their skills were not transferrable, and many of them were too old to compete successfully in the job market (R. 172–173; 35, 49). Finally, he warned, "if you don't feel that the plant can go out of business all you have to do is look around Holyoke and see a lot of them out of business" (R. 174; 65).

On November 2 and November 5, after the Union's first petition for election was filed, President Sinclair sent letters to the employees which repeated essentially the same points (R. 123–129). The November 5 letter emphasized that the new ownership had "no

ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio * * * you can be sure that their dollars are going to go where they can earn the most pennies" (R. 128).[5]

Two or three weeks before the December 9 election, President Sinclair distributed a pamphlet addressed "To All Wire Weavers" (R. 176–177; 143–146). The pamphlet, containing words and pictures, was captioned "Do You Want Another 13-Week Strike?" It stated that "The Union has only one weapon with which it can try to make good its big campaign promise to the Wire Weavers. That weapon is a strike. We had a 13-week strike in the Wire Weaving Department in the early 1950's. The Wire Weaving Department was closed" (R. 144). It added (*ibid.*): "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. * * * The Teamsters Union is a strike-happy outfit."

On November 30, President Sinclair sent another letter to all wire weavers, in which he again reminded the employees of the long strike of 1952 which put the Company "virtually out of business" (R. 177–178; 130). Although the plant "reopened on a non-union basis after that strike" (R. 130), Sinclair emphasized that the Company was then a locally owned business. "Today it is a different story. We are part

[5] The Company's statements prior to filing of the November 8 representation petition were relied on by the Board only for background purposes (R. 183).

of a multi-plant operation. A strike can still close the * * * plant, but other plants can pick up the work"; "the new ownership * * * is interested in profits and not pressure" (R. 131). Finally, he warned that the Union "can make 'big' demands which the Company cannot meet"; "[w]hen the Company answer is 'no' to the Teamsters Union 'big' demands, it can call you out on strike"; "a strike is a Union's only weapon to enforce its 'big' demands" (*ibid.*). The very next day, he sent another letter stressing the Teamsters' "hoodlum control" (R. 133–135).[6]

On December 7, two days before the election, a four-page leaflet signed by President Sinclair was distributed to the wire weavers (R. 178–180; 137–140). Entitled "Let's Look At The Record," the first page carried a large cartoon depicting the preparation of a grave for the Sinclair Company by persons labeled "IBT" and "Hoffa's Hood"; the other headstones in the cemetery contained the names of other plants in the area which allegedly closed because of unions (R. 137). The following statements appeared below the cartoon: "The Holyoke-Springfield industrial graveyard is filled with companies which died under union pressure." Some textile and paper mills have moved South whereupon "makers of [relevant wire woven

[6] Several of the letters and pamphlets emphasized the criminal elements in the leadership of the Teamsters Union and the fact that union dues went towards paying their legal and other expenses; on November 22, President Sinclair sent each employee a copy of the late Senator Kennedy's *The Enemy Within* and urged them to read it (R. 129–130, 133–135, 141). The Board made clear, however, that it had not relied on the latter act in making its findings (R. 204).

products] opened plants in the South to be near their customers" (*ibid.*). The leaflet suggested that "every wire weaver in this place would find it profitable to visit a few of the sites of once prosperous companies in the Holyoke area" before deciding how to vote (R. 137). The second page of the leaflet listed 12 named companies, with the number of "jobs lost" opposite each, totaling "around 3500" (R. 138). The leaflet acknowledged that "some of the industrial corpses were already sick when the Unions came in," but added that "the 'Union Doctors' gave them bloodletting strikes, restricted production and higher labor costs." Although Sinclair admitted at the hearing that he had no objective basis for linking union demands to the demise of these companies (R. 40–41, 61–63), the pamphlet stated that "the result * * * was the death of these companies" (*ibid.*). On the back of the leaflet were photographs of five plants, under the captions, "Remember When These Plants Furnished Jobs To Area People * * * Think * * * Unions Furnished No Job Security Here!" The plants were identified by name, and were characterized as follows: "Not Even G.E. Could Make A Profit Here," "Death Along The River," and "So Quiet Today" (R. 140).

On December 8, the day before the election, President Sinclair addressed the wire weavers (R. 180–182). He repeated that the Company's financial condition was precarious; that the Teamsters' demands "could lead to even larger losses than we have had," and result in a strike; and that this would

jeopardize the continued operation of the plant since the new ownership "have made it clear * * * that they look for profit and not a hole to pour money down" (R. 163). He added: "Now I would be the last one to blacklist you from getting another job if this plant closed by strike, but the Teamsters can't guarantee you another job either" (R. 164). He then repeated an earlier warning that age and lack of education would make it hard for some of the weavers to obtain new jobs (R. 164, 69–72).[7]

The Board election was held on December 9, and the Union was defeated by a vote of 7 to 6 (R. 169). The Union timely filed both objections to the election and unfair labor practice charges. These were consolidated for hearing before a Trial Examiner. (R. 166, 168).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board agreed with its Trial Examiner that President Sinclair's communications with the employees on and after November 8, considered as a whole and in the light of his earlier letters and speeches, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the

[7] At the Board hearing, President Sinclair admitted that the Company had made a profit in 1965 (R. 69). He also admitted that Local No. 404 had never made any demands upon the Company, and that he had no basis for concluding that this local or its leaders were connected with the racketeering or picket line violence which he had mentioned (R. 184; 51, 47–48).

weaving production, with the resultant loss of jobs to the wire weavers." Accordingly, the Board found that the Company violated Section 8(a)(1) of the Act (R. 183). The Board also found that the Union had valid authorization cards from a majority of the employees when it requested recognition on September 20; that the Company declined recognition, not because of a good faith doubt as to the Union's majority status, but in order to gain time to dissipate that status; and that the Company's refusal to bargain thus violated Section 8(a)(5) and (1) of the Act (R. 189–195). The Board set the election aside (R. 188–189), and ordered the Company to cease and desist from its unfair labor practices and to bargain with the Union upon request (R. 198–200).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings and conclusions and enforced its order in full (R. 205–213).

SUMMARY OF ARGUMENT

This case presents two separate questions. The first is whether the Company violated Section 8(a)(1) of the National Labor Relations Act by leading its employees to believe that it would be likely to close its plant or transfer its operations if they selected the Union. The second is whether the Board properly concluded, in part on the basis of the Section 8(a)(1) violation, that the Company had not predicated its refusal to bargain with the Union in good faith on a

doubt as to its majority status, and appropriately ordered the Company to bargain with the Union, which represented a majority of its wire weavers as shown by the authorization cards.

I.

Whether the Company violated Section 8(a)(1) by its pre-election communications to its employees, or rather engaged in a simple expression of views protected by Section 8(c) of the Act, must be decided in the context in which the communications were made, and with an eye to their likely impact on the employees. The crucial issue is whether the communications contained a "threat of reprisal or force or promise of benefit"; "an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition." *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C.A. 2). In the labor management context, words which standing alone might appear innocuous may carry a coercive sting. Section 8(c) does not protect such words. Reliance on context does not render the Board's distinction impermissibly vague; and because of the importance of context, it is for the Board to make the initial assessment whether or not a proscribed threat has been made.

In this case, the Board reasonably concluded that President Sinclair's communications conveyed to the

employees a threat that the Company would be likely to close its plant or transfer its operations if they selected the Union. His statements relied on a categorical assumption that the local Union would make unreasonable demands the Company could not meet and then call a strike so severe as to put the Company out of business. He also relied on assertions, for which he knew he had no factual basis, that unionization had caused other factories in the neighborhood to close down. Conscious overstatement or misrepresentation of the perils of unionization has often been found by the Board to be coercive. Employees readily understand that such remarks really express not predictions about economic matters beyond management's control but threats as to what management will do if the union wins the election.

II

As we show in detail in our brief in *National Labor Relations Board* v. *Gissel,* Nos. 573 and 691, this Term, a Board election is not the only means by which a Union's majority status may be established. Petitioner considerably overstates the alleged unreliability of union authorization cards. Its statistics are incomplete and on the facts of this case, as in *Gissel,* there was neither any reason to doubt the reliability of the authorization cards obtained nor any challenge to the cards before the Board on the grounds of misrepresentation or coercion. Although a secret ballot election is the preferable means for determining representation questions, when the employer's unfair practices interfere with the election

process the Board is justified in relying upon cards. Nothing in the legislative history of the Act forecloses such reliance.

In this case the Union plainly represented a majority of the unit at the time of its demand for recognition. Moreover, the Company's unfair practices justified the Board's inference that, whether or not it knew the Union had a majority of cards, its refusal to deal with the Union was not motivated in good faith by doubt about its status, but by a desire to gain time in which to dissipate by unlawful means whatever strength the Union had. The Board could also properly conclude that the implied threats of plant closure if the Union was selected, made by one in a position to carry them out, chilled employee support for the Union, and that a second election would provide only another reflection of this unlawfully influenced sentiment and further opportunity for employer coercion. In this situation, a bargaining order is the only appropriate remedy.

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(A)(1) OF THE ACT BY LEADING ITS EMPLOYEES TO BELIEVE THAT IT WOULD BE LIKELY TO CLOSE THE PLANT OR TRANSFER ITS OPERATIONS IF THEY SELECTED THE UNION

A. IN DETERMINING WHETHER EMPLOYER COMMUNICATIONS CONSTITUTE A THREAT OF REPRISAL OR FORCE, IT IS NECESSARY TO LOOK BEYOND THE BARE WORDS AND TO EVALUATE THEIR IMPACT UPON THE EMPLOYEES IN THE CONTEXT IN WHICH THEY ARE USED.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to self-organization. Section 8(c), in turn, provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Read together, these provisions leave an employer free to communicate to the employees his views respecting unions, so long as that communication does not contain a "threat of reprisal or force or promise of benefit."

The line between a threat of reprisal and a permissible expression of views is easy to draw in general terms. "[A]s the dictionaries tell us, a 'threat of reprisal' means a 'threat of retaliation' and this in turn means not a prediction that adverse consequences will develop but a threat that they will be deliberately inflicted in return for an injury." *National Labor Relations Board* v. *Golub Corp.*, 388 F. 2d 921, 928 (C.A. 2). Thus, "an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are *outside his control,* as distinguished from threats of economic reprisal to be taken solely *on his own volition.*" *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C.A. 2) (emphasis added).[8] However,

[8] "The most obvious reason for excepting coercive speech [from the protection of the First Amendment] is to prevent the employer from trading on his economic power over the employees by threatening retribution if they vote for the union." Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 69 (1964).

since today relatively few employers make express threats,[9] the problem is to determine when words couched as "predictions" in fact convey a threat of reprisal.

In *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479, this Court recognized that innocuous words may be "raised * * * to the stature of coercion by reliance on the surrounding circumstances."[10] Similarly, words or statements which convey no threat, when read separately, can have a coercive impact when read as a whole. "[W]ords and speech are not governed entirely by mathematical concepts. Words and phrases, each lawful when considered alone, can be united in such a fashion as to yield an improper end product." *Daniel Construction Co.* v. *National Labor Relations Board*, 341 F. 2d 805, 811 (C.A. 4), certiorari denied, 382 U.S. 831. The "impact of the words is a function of the time and place, of the positions of the speaker and listener, of the tone and past relations—in short, of environment and experience. * * * The dictionary

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[9] "Today the employer seldom engages in crude, flagrant derelictions. Nowadays it is usually a case of more subtlety, perhaps the more effective, and certainly more likely to escape legal condemnation." *National Labor Relations Board* v. *Neuhoff Bros.*, 375 F. 2d 372, 374 (C.A. 5).

[10] Although in that case the Court rejected the Board's conclusion that the employer's speeches were coercive *per se*, it held that the Board should consider whether coerciveness appeared in the light of the employer's other conduct. As the Court added in *Thomas* v. *Collins*, 323 U.S. 516, 537–538: "When to [employer] persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed."

meaning is irrelevant; the question is, what did the speaker intend and the listener understand." Cox, *Law and the National Labor Policy* 44 (1960). Though an employer "proceed[s] carefully in attempting to limit his communications to the legally permissible, his words must be judged by their import to his employees * * *. [O]ne who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 372 (C.A. 7).[11]

Section 8(c) of the Act is consistent with this analysis. That section makes an expression of views or opinion privileged "if such expression contains no threat of reprisal." It does not require that the threat of reprisal be express, nor does it provide any guides for determining whether an utterance contains a

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[11] As Judge Learned Hand observed long ago:

"Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first." [*National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 957 (C.A. 2).]

Although this Court's *Virginia Electric & Power* decision, *supra*, overruled the *Feberbush* holding that the Board could infer coercion merely from the circumstance that the employer had addressed his employees on plant premises (see *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. 2d 993 (C.A. 2)), it did not impair the validity of Judge Hand's statement.

threat. Moreover, the legislative history of Section 8(c) shows that it was aimed at:

> The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose. * * * The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination. [H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45, 1 Leg. Hist. (1947) 549.] [12]

In *Linn* v. *United Plant Guard Workers*, 383 U.S. 54, the Court accepted this view of Section 8(c), in holding that it did not protect libelous statements which were maliciously disseminated in the course of a labor dispute. "The wording of the statute indicates * * * that § 8(c) was not designed to serve [the inter-

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[12] As Senator Taft added:

"The purpose of the conferees * * * was to make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice. The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged. * * * There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed unfair labor practices simply because at one time or another the employer has expressed himself as not in favor of unionization of his employees. * * *" (93 Cong. Rec. 6859, 2 Leg. Hist. (1947) 1624.)

est of encouraging free debate on issues dividing labor and management] by immunizing all statements made in the course of a labor controversy. * * * It is more likely that Congress adopted this section for a narrower purpose, *i.e.*, to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements." 383 U.S. at 62, n. 5.

Moreover, in distinguishing between simple statements of distaste for unions or arguments against unionization, on the one hand, and threats—however guarded—about what the employer will do if a union is voted in, the Board's rule is not impermissibly vague. Section 8(c) was never intended to permit sophisticated employers to circumvent the Act's prohibition against coercion of their employees' choice by couching their threats in a particular way. The touchstone of vagueness is whether conscientious employers may be deterred from making their views on unionization known, and nothing in the Board's statement or application of its test for coercion suggests that such deterrence is likely to occur. Although there may inevitably be imprecision in the *formulation* of a distinction, such as this, whose application is so heavily dependent upon context, employers are intimately familiar with the particular labor-management context from which the distinction draws meaning. Thus, in focussing on "the question * * * what did the speaker intend and the listener understand," Cox, *op. cit. supra, ibid.*, the Board's rule provides a meaningful and workable standard of behavior. Cf. *Federal Trade Commission* v. *Texaco, Inc.*, No. 24, this Term, decided December 16, 1968; *Giboney* v. *Em-*

pire Storage Co., 336 U.S. 490; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29. As here, the cases in which the Board has found statements in the form of predictions to have been coercive (*infra* at pp. 22, 24, 26) are uniformly characterized by reckless if not deliberate overstatement or misrepresentation of the effects unionization has had on other plants, or "might" have in the employer's plant—overstatements from which the employees can readily infer that their employer is in reality describing effects which he will bring about if a union is selected.

Finally, because of the importance to this inquiry of a thorough acquaintance with the context in which such statements occur, it is particularly appropriate for the reviewing court to recognize "the Board's competence in the first instance to weigh the significance of the raw facts of conduct and to draw from them an informed judgment as to the ultimate fact. * * * [T]he significance of conduct, itself apparently innocent and evidently insufficient to sustain a finding of an unfair labor practice, 'may be altered by imponderable subtleties at work, which it is not [the Court's] function to appraise' but which are, first, for the Board's consideration upon all the evidence. *Labor Board* v. *Virginia Power Co.*, 314 U.S. 469, 479." *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477, 505–506. Nor is this a rule limited to non-speech cases; the quotation from the *Virginia Power Co.* case directly concerned "the purport of * * * utterances." 314 U.S. at 479.

This is neither to say that the Board's findings have presumptive validity, nor to relieve the reviewing

court of the obligation, which it discharged here, to review the entire record and satisfy itself that the Board has not abridged the right of free speech. But as this Court has made plain, "the requirement for canvassing 'the whole record' in order to ascertain substantiality does not * * * mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. "An administrative agency * * * may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based on the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration * * *." *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 48–49, quoting from *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 800.

In sum, as in the case of unfair labor practice conduct generally, it is for the Board to make the initial assessment whether or not a proscribed threat has been made. Nothing in Section 8(c) or the Constitution precludes it from predicating that assessment on apparently innocuous words and phrases which, when viewed as a whole and from the stand-

point of their likely impact on the employees, in fact convey to them an employer threat of reprisal.[13]

B. THE BOARD REASONABLY CONCLUDED THAT PRESIDENT SINCLAIR'S COMMUNICATIONS CONVEYED TO THE EMPLOYEES A THREAT THAT THE COMPANY WOULD CLOSE THE PLANT OR TRANSFER ITS OPERATIONS IF THEY SELECTED THE UNION

President Sinclair's speeches and other communications to the wire weavers made the following points: (1) that the 1952 strike had left the Company in a state of continuing financial difficulty; (2) that a union would make unreasonable demands which the Company could not meet, and then its only recourse would be to strike; (3) that such recourse was particularly to be expected of the Teamsters Union, which was a "strike happy outfit" led by racketeers; (4) that another strike could result in the closing of the plant, as Lindsay (the parent corporation) would shift work to its Mississippi and Ohio plants if Sinclair did not make a profit; and (5) that the wire weavers would then lose their jobs and, because of their advanced age and limited craft skills, they would find it difficult to find other work.

To support these "predictions," President Sinclair relied on a categorical assumption that Local 404 would make unreasonable demands the Company could not meet and then call a strike so severe as to put the Company out of business, and an assertion,

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[13] *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, is not to the contrary. Although the Court there declined to place any reliance on the employer's letter of March 4 promising benefits (at 409–410, n. 3), it had no occasion to consider whether the letter, standing alone, violated Section 8(a)(1), since no such violation was alleged.

for which he knew he had no basis, that unionization in other area plants had led to their closure. The question before the Board was whether these were *bona fide* predictions of economic matters beyond management's control, or in reality statements which the employees would understand as relating to matters subject to its volition and bearing an implied threat as to the choice management would make if the employees chose the Union.

By insisting on the inevitability of unreasonable demands from the Union, followed by a strike and the possibility of concomitant closure, President Sinclair's actions were such as to make it proper for the Board to find that he had engaged in a form of conscious overstatement or misrepresentation of the perils of unionization of the sort which the Board has frequently found to have been coercive. See, *e.g.*, *Miller-Charles and Co.*, 146 NLRB 405, enforced 341 F. 2d 870 (C.A. 2); *Harvey Aluminum*, 156 NLRB 1353, 1358–1360; *Surprenant Mfg. Co.*, 144 NLRB 507, 510–511, enforced 341 F. 2d 756, 761 (C.A. 6); *Ideal Baking Co.*, 143 NLRB 546; *Kolmar Laboratories, Inc.*, 159 NLRB 805, 807–810, and cases cited in n. 3,[14] enforced 387 F. 2d 833 (C.A. 7). Local 404 had as yet presented no demands to him (R. 51), much less threatened a strike.[15]

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[14] These were the cases relied upon by the Trial Examiner in concluding that President Sinclair's communications had been coercive (R. 183–184, n. 9).

[15] In July, before the Union's organizing drive started, Robert Williams, President of the Wire Weavers Trade Division of the Teamsters International, sent the Company's employees a letter which indicated that the Teamsters Union had

The employees would be likely to interpret Sinclair's remarks as really intended to express an intention on the part of the Company to adopt an intransigent attitude toward the Union's demands, no matter what they were, and thus force the Union to strike. They would realize, too, that in repeatedly warning that if a strike occurred the parent corporation could close the Holyoke plant and transfer its work elsewhere (R. 44, 46, 49, 60), Sinclair was also speaking of matters within management's control. A majority of the employees had been members of the American Wire Weavers Protective Association in 1952 (R. 75–76), were thus aware of how the Company had "broken" that union, and could well have understood President Sinclair's apparent predictions as a firm statement of intention not to deal with the Union under any conditions, even if this meant closing the plant or transferring its work elsewhere.

The Board could find that this was not a permissible expression of "views and opinion," but rather a threat of reprisal proscribed by Section 8(a)(1) of the Act. "[W]hen statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of prob-

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organized the major weaving firms in the country and that it had just obtained "a collective bargaining package which was better than 62½¢ over the three year period" from a firm in Wisconsin (R. 108). There is little basis for petitioner's assumption (Br. 59–60, n. 53) that Local 404 would have presented a similar demand to the Company, which was located in a different area and which allegedly had a depressed financial condition.

ability or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practices." *National Labor Relations Board* v. *Nabors*, 196 F. 2d 272, 276 (C.A. 5), certiorari denied, 344 U.S. 865. Accord: *Surprenant Mfg. Co.* v. *National Labor Relations Board*, 341 F. 2d 756, 761 (C.A. 6); *National Labor Relations Board* v. *Kolmar Laboratories, Inc.*, 387 F. 2d 833 (C.A. 7); *National Labor Relations Board* v. *Louisiana Mfg. Co.*, 374 F. 2d 696, 702–703 (C.A. 8).[16]

President Sinclair's references to other plants in the Holyoke area allegedly closed because the "'Union

[16] As Dean Bok has pointed out:

"* * * When the employer declares that he will have to move or close down if a union comes in and obtains higher wages, union organizers can reply that their negotiators will take account of the company's position and endeavor not to induce its departure from the area. Under these circumstances, the arguments on both sides are legitimate, and the voters are free to choose between them. But if the employees are led to believe that the company will simply close down automatically if the union is selected, they are left with a devastating and improper assertion which the organizer is unable to rebut save by pointing out that the employer cannot carry out his plan without violating the law. * * * [T]his is an argument that will often make little or no impression on the voters. Hence, much may turn on whether the employees understand that the employer will close down only if economic considerations impel him to do so, and the Board can legitimately take exception to any statement that could reasonably convey a contrary impression. Indeed, one may even condemn ambiguous references to the closing of other plants that have no apparent purpose other than to arouse the apprehensions of the employees. * * *" [Bok, *op. cit.*, *supra*, 78 Harv. L. Rev. at 77.]

Doctors' gave them bloodletting strikes, restricted production and higher labor costs" were equally coercive. At the Board hearing, he admitted that he had no basis for his assertion that the closing of these plants was attributable to a union.[17] These reckless or deliberately false statements about plant closings, which petitioner's brief makes no attempt to justify (see Br. 62–64), provided an adequate basis for the Board to

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[17] President Sinclair testified (R. 40–41):

Q. Did the union have anything to do to your knowledge [with] the closing down of the White & Wyckoff Company?

A. No.

Q. Did * * * a union have anything to do with the closing down of Chemical Fine Paper Company?

A. I don't believe so, no.

Q. Did a union hav[e] anything to do with the closing down of G.E.?

A. G.E. was constantly faced with wildcat strikes and other types of strikes in that plant. I have no knowledge of their policy or decision but my feeling would be that, yes a union certainly was evident in their decision to close.

* * * * *

Q. Based on information that you had at the time you prepared that pamphlet. Did a union have anything to do with the closing down of [Crocker-McElwain] company?

A. Not that I know of.

Q. * * * C. F. Church & Company * * * based on any information that you had did a union have anything to do with the closing down of that company?

A. Only hearsay information that I had.

He later testified that C. F. Church & Co. had merely moved its plant 20 miles away, to Palmer, Massachusetts (R. 62), and that, although the union was a factor, he "wouldn't say it caused" the closedown of the G.E. plant (R. 63).

find that President Sinclair was threatening closure, not simply presenting his opinion as to the consequences of unionization. Employees are particularly sensitive about remarks which equate the union with plant shut downs (see n. 16, *supra*); thus, the Board could find that the Company's employees would interpret these statements, too, as a warning of the economic reprisals which the Company itself would take if they selected the Union. "It seems clear that Congress did not intend to protect an unqualified assertion of such importance unless the utterer can show that he had some reasonable basis for it." *Int'l Union of Electrical Workers* v. *National Labor Relations Board,* 289 F. 2d 757, 763 (C.A. D.C.). Accord: *National Labor Relations Board* v. *Miller,* 341 F. 2d 870, 873 (C.A. 2); *National Labor Relations Board* v. *Antell,* 358 F. 2d 880, 881, n. 1 (C.A. 1). Cf. *National Labor Relations Board* v. *Golub,* 388 F. 2d 921, 928 (C.A. 2) ("what is in form a prediction could so far outrun any possible basis for it that the Board might be justified in concluding a threat was intended * * *").

Finally, it is clear that the Trial Examiner and the Board relied upon these factors in finding that the Company had violated Section 8(a)(1) of the Act "by threatening employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment for the wire weavers, if they were to select the [Union] as their

collective bargaining representative" (R. 197). The cases the Trial Examiner cited, *supra*, at note 14, each involved management "predictions" about what the union would inevitably demand, and the economic hardships which would necessarily result to the employees from that demand; in each, those hardships were within management control and the employees would understand that it was management that was likely to impose them if the union won. See also *National Labor Relations Board* v. *Golub Corp.*, *supra*, 388 F. 2d at 930 (dissenting opinion). Thus, the Board reasonably found the required element of coercion, and properly ordered the Company to desist.[18]

[18] The Board's order is not, as petitioner alleges (Br. 46), "almost a complete prohibition of speech," but is the typical form of remedy the Board prescribes for such unfair labor practices. It requires the Company to cease and desist from—

"(b) Threatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the [Union], or any other labor organization as their collective-bargaining representative." (R. 199.)

When read against the Board's findings and the supporting evidence, the order adequately informs the Company of what is required of it in the future. It is on notice that it must refrain from threatening to close the plant if the employees select a union representative, either overtly or by means of statements like those here, which, though couched in terms of predictions, would reasonably be construed by its employees as conveying such a threat. See Jaffe, *Judicial Control of Administrative Action* (1965) 275–276, 279. Petitioner is free to express its views and opinions respecting unionization, so long as those statements do not, as did those here, threaten reprisal.

II. THE BOARD PROPERLY CONCLUDED THAT THE COMPANY'S REFUSAL TO BARGAIN WITH THE UNION WAS NOT BASED ON A GOOD FAITH DOUBT AS TO ITS MAJORITY STATUS; A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR BOTH THIS UNLAWFUL REFUSAL TO BARGAIN AND THE OTHER UNFAIR LABOR PRACTICES

A. UNDER THE ACT, A BOARD ELECTION IS NOT THE ONLY MEANS BY WHICH A UNION'S MAJORITY STATUS MAY BE ESTABLISHED

The Board found that the Union had valid authorization cards from 11 of the 14 wire weavers on September 20, 1965, when it requested recognition as their representative; that the Company's refusal to bargain with the Union was not based on a good faith doubt as to its majority status, but a desire to undermine the Union by unlawful means—as shown by its action in threatening the employees with reprisals if they selected the Union; that the Company's conduct in fact did dissipate the Union's majority and made a fair election impossible; and that a bargaining order was an appropriate remedy (R. 189–192, 195, 198).

Such findings and orders have been approved, as in this case, in all Circuits save the Fourth, which in a series of recent decisions, beginning with *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, has departed from these settled principles chiefly for the reasons which the Company here asserts: (1) authorization cards are inherently so unreliable that an employer who refuses to bargain with a union whose claim to represent a majority of the employees is based thereon must always be deemed to be acting on a good faith doubt that the union

does represent a majority; and (2) Congress, in amending the Act in 1947, intended to make a Board election the only method of resolving questions of majority status under the Act. In general, we rely on our Brief in *National Labor Relations Board* v. *Gissel,* Nos. 573 and 691, this Term, to show that these arguments overstate the deficiencies of authorization cards and misread the legislative history of the 1947 amendments to the Act. Here, we deal only with the additional considerations which the Company and the amici advance.

1. The reliability of cards

In arguing that cards are inherently unreliable, petitioner claims that the Teamsters Union failed to obtain 30 percent of the vote in 73 of 190 elections recently held in units of comparable size, although it was required to produce cards from that proportion of the employees in order to have its election petitions processed (Br. 77–79). But a careful examination of the Board's statistics [19] shows that petitioner's sample includes only the elections in which the Teamsters were defeated. In the same period, the Teamsters Union won 223 elections. Thus, the net result is quite different: that in 340 of 413 elections (82.5 percent), the Teamsters received more than the 30 percent employee support pledged by the authorization cards. This figure shows an impressive correlation between card authorizations and actual election results.

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[19] *NLRB Election Reports*, compiled by the Board's Division of Administration.

Moreover, as in *Gissel,* the facts furnish no basis for doubting the reliability of the authorization cards obtained by the Union in this case. Not one card here is challenged on the ground of misrepresentation or coercion. Similarly, the argument that a card signing drive deprives employees of the opportunity to hear the employer's side is wholly inapposite, since the Union's demand for recognition was not made until almost two months after the Company became aware of the campaign—time enough for the Company president to have delivered coercive speeches to all the employees.

Finally, as in *Gissel,* petitioner's arguments that secret ballot elections are more dependable than cards and that the Board's present rules foreclose effective checking of cards must be viewed against its conduct. A secret ballot election is not more dependable than cards if the employer has coerced his employees in their choice, thus precluding a fair election. And the alleged dilemma of choosing between an "independent" card check which tells the employer nothing about how the cards were obtained and a personal investigation which risks unfair labor practice findings—the "Scylla and Charybdis" of Judge Brown's oft-quoted metaphor (*National Labor Relations Board* v. *Dan River Mills,* 274 F. 2d 381, 388 (C.A. 5))—is more apparent than real. An employer is not obligated to accept a card check as proof of majority

status; nor is he required to justify his refusal to do so by making his own investigation of employee sentiment. Rather, so long as he acts in good faith, he may lawfully demand a Board conducted election to resolve his doubts of a union's majority based on cards. *Aaron Bros. Co.*, 158 NLRB 1077, 1078; *H & W Construction Co., Inc.*, 161 NLRB 852, 857. But where, as here, the employer proceeds to undermine the election process through substantial unfair labor practices, he is in no position to complain that the unreliability of cards trapped him in a legal paradox.

2. The legislative history

Petitioner adds nothing new to the discussion of the legislative history, which is fully dealt with in our *Gissel* brief, pp. 33–35. As did the Fourth Circuit, it concentrates on the elimination from Section 9(c) of the Wagner Act of its provision that a Board representation hearing might be held "either in conjunction with a proceeding under section 10 or otherwise" and that the Board could either take a secret ballot of employees "or utilize any other suitable method to ascertain such representatives" (Pet. Br. 73). But these changes did no more than make a Board election the sole basis for *certification*: under the Wagner Act, the Board had sometimes joined representation and unfair labor practice proceedings and, on finding in the latter that a union with which the employer had refused to bargain represented the majority of employees, *cer-*

tified the union without an election and dismissed the representation petition.[20]

Petitioner overlooks the legislative history of Section 8(a)(5), which the House sought to amend in 1947 to permit a refusal to bargain violation to be found only where an employer failed to bargain with a union already recognized or currently certified; the employer's duty to bargain on the basis of cards and the Section 8(a)(5) proceeding as a means of enforcing such duty would have been totally eliminated. But as Senator Taft reported to the Senate (93 Cong. Rec. 6443, 2 Leg. Hist. (1947) (1539), "the Senate conference refused to yield" on this matter, thereby assuring that the "unfair labor practices contained in the present National Labor Relations Act remain unchanged. * * *" Thus, by an explicit choice, Congress retained the statutory authority for bargaining orders issued in unfair labor practice proceedings on the basis of authorization cards. "Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) * * * was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851, 861–862 (1967).[21]

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[20] See *Atlantic Refining Co.*, 1 NLRB 359, 369; *Shell Oil Co.*, 2 NLRB 835, 853; *Omaha Hat Corp.*, 4 NLRB 878, 892.

[21] The American Retail Federation contends in its brief *amicus curiae* that the Board once recognized that the amended Sec-

B. THE BOARD CORRECTLY FOUND THAT THE UNION REPRESENTED A MAJORITY OF UNIT EMPLOYEES AT THE TIME OF ITS DEMAND FOR RECOGNITION, AND THAT THE COMPANY'S REFUSAL TO RECOGNIZE AND BARGAIN WITH IT WAS NOT PROMPTED IN GOOD FAITH BY DOUBT AS TO THAT FACT

It is undisputed that, before Local 404 presented the Company with its September 20 demand for recognition, it had obtained valid authorization cards from a majority of the wire weavers. On September 28, the Company rejected this demand, alleging as its reasons: (a) a good faith doubt of the claimed majority; (b) the general unreliability of cards; (c) the probable existence of unit issues which should be determined by the Board. But as soon as an election appeared near, President Sinclair launched a month-long barrage of anti-union letters, speeches, handbills, photographs, and cartoons. As shown above, the totality of the Company's message was that a Union victory would precipitate an *inevitable* succession of dire consequences—strikes, shut down, loss of jobs—a message which the employees would be likely to interpret as a

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tion 9(c) left "election by secret ballot as the sole method of resolving a question concerning representation * * *" (at p. 12, n. 25, quoting the Board's Annual Report for 1948). But this recognition was limited to the question of certification. The Board stated at page 60 of the same report:

"An employer acting in good faith may insist, as a condition precedent to recognition, that the union submit proof that it represents a majority of employees in the unit and that the proof be made through the medium of a Board-directed election. But when the employer does not make its request for proof of majority in good faith, as when it is made against a background of unfair labor practices intended to destroy the union's majority, noncompliance with the request does not constitute a defense to a refusal to bargain charge."

The Board's position is the same today.

threat to close the plant or transfer its operations elsewhere.

Threats of this nature, made by the president, cannot be reconciled with the Company's alleged desire to resolve good faith doubts of the Union's majority status in a Board election, for they are serious enough to preclude a fair election (see *infra*, pp. 38–40). Nor is such conduct consistent with a conclusion that the Company was concerned one way or another with the number of cards actually obtained by the Union. Thus, as in *Gissel* (Brief, pp. 23–25), the Board reasonably could infer, not that the employer actually knew that the Union had a majority of cards, but that any doubt which he might have had was not the basic motive for his refusal to bargain.

> Even if respondent had some doubts as to the majority status of the union, its entering upon an unlawful course of conduct in violation of section 8(a)(1) and clearly directed at undermining whatever support the union had * * * indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that no matter what the proper unit was the union would not have a majority. [*National Labor Relations Board v. Luisi Truck Lines*, 384 F. 2d 842, 847 (C.A. 9).]

Judge Friendly (on whose views petitioner relies) has similarly recognized that—

> the Board may properly insist not only that there be a reasonable basis for doubt but that

> this be a substantial reason for the employer's refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event, and that his commission of unfair labor practices has some bearing on these issues, particularly the latter. [*National Labor Relations Board* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 838 (C.A. 2).]

Thus, the Board properly found the Company's refusal to bargain to have violated the bargaining obligation imposed by Section 8(a)(5) of the Act.[22]

Petitioner contends, however, that the Union's "confusing" equivocation as to the appropriate bargaining unit fully justified a rejection of the demand for recognition (Br. 82–83, 85–86). Thus, a month prior to the September 20 demand, President Sinclair received notification through an attorney for the parent Company in Cleveland that the Teamsters International was claiming majority status in a production and maintenance unit comprised of about 87 employees at the Holyoke plant (R. 30–31). Since he

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[22] Under the Board's *Bernel Foam Products Co.* doctrine, 146 NLRB 1277, there is no inconsistency between the finding of a refusal to bargain and the Union's participation in a consent election agreement which stated, *inter alia*, that a "question of representation" existed. See the Board's *Gissel* Brief at 53–55. Although the Board stated that a bargaining order would have been an appropriate remedy in this case even if a good faith doubt had been present (R. 197–198), that ruling hardly suggests that the Board considers the question of such doubt irrelevant, as petitioner urges (Br. 83–84). That statement simply reflects the Board's view that the unfair labor practices here were particularly damaging, and intractable by any lesser remedy. See *infra*, p. 39, n. 24.

thought it "strange" that the request did not come from a local representative (R. 30) and since he did not believe that the Union could have gained majority status in a full production and maintenance unit (which in any event included only about 65 employees) (R. 31, 80–81), President Sinclair rejected the demand.

Whatever the merits of this initial rejection, it provided no basis for denial of the September 20 demand. Quite the contrary, that demand fully repaired all the purported deficiencies of the earlier request: *i.e.*, the demand came directly from Local 404 and it was expressly limited to a relatively small unit which the Union could well have organized. Indeed, President Sinclair admitted knowing that the campaign had begun in the wire weavers department (R. 34). Early in July, he had received a copy of a letter which the wire weavers division of the Teamsters Union had sent to the employees, and shortly thereafter he spoke to the wire weavers about the Union, announcing his intention to be "blunt" (R. 31, 34, 108–109). Moreover, Sinclair was fully aware that the union which had previously represented his employees had done so in just such a unit of wire weavers and apprentices (R. 82, 193–194). In this context, when the Company received the September 20 demand, it had every reason to believe that Local 404 had tendered a *bona fide* request for recognition, in an appropriate and potentially organizable unit.

Petitioner further contends that the September 20 demand was itself confusing and misleading because of the inclusion of apprentices—a classification which

the Company had not employed for several years. Specifically, petitioner argues that it did not know what the Union meant by "apprentices," or whether this referred to other employees in the weaving department or to a wholly separate classification (R. 32–33). But, as the Trial Examiner noted:

> Sinclair very well knew what an apprentice was. He admitted that Respondent had in the past employed wire weaver apprentices, that it had not been unusual for a wire weaving department to employ both journeymen and wire weaver apprentices, that the only union which ever represented any of Respondent's employees represented the journeymen wire weavers and apprentices, and that many of the journeymen who were employed by Respondent during the period from July through December had started as apprentices and had served their apprentice years with Respondent. He further admitted that the helpers employed in the weaving department "to assist the weavers in the various operations of setting up and removing cloth" are not apprentices. [R. 193–194; 81–83, 74.]

Moreover, at the time of the refusal to bargain, petitioner made no mention of the alleged confusion in regard to apprentices, but, rather, responded only that it doubted the Union's majority and that it believed there were unit issues that should be settled by the Board (R. 192–193; 118–119).

Finally, petitioner points out that, after the September 20 refusal to bargain, the Union altered its unit position several times, presenting a new demand in a different unit on October 11, then stipulating to

an election in still another unit on November 2; and finally filing a petition limited to the wire weavers on November 8 (R. 120–121, 159, 161). However, these post-refusal events could not possibly have "confused" the Company at the time of the September 20 demand and its rejection.[23] Indeed, the Company's unlawful conduct after November 8, when the election date had finally been set and all the unit confusion had unquestionably ended, justifies the conclusion that the underlying motivation for its actions was an intent to avoid the statutory bargaining obligation—regardless of what unit was requested.

C. A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR THE UNFAIR LABOR PRACTICES FOUND

The Board found that the Company's unlawful refusal to bargain, coupled with its subsequent coercive conduct, dissipated the Union's majority and required that the election, which the Union lost, be set aside. In these circumstances, a remedy which merely imposed a cease-and-desist requirement and directed a rerun election would be inadequate. It would force the employees to choose their representative in an election that inevitably would still be tainted by the past violations, and thus permit the Company to gather the fruits of its illegal conduct; moreover, it might encourage the Company to meet the new election with

[23] As the Court of Appeals for the Seventh Circuit stated in *National Labor Relations Board* v. *Richman Bros. Co.*, 387 F. 2d 809, 814, "[w]hen all genuine doubt of the union's majority in an appropriate unit has been erased, the employer's duty to bargain becomes fixed. * * * Events subsequent to that time * * * are irrelevant."

renewed coercion—at no more apparent risk than the possibility of still another election. Thus, the Board could properly conclude that the *status quo ante* could most nearly be restored, and the policy of the Act best effectuated, by an order requiring the Company to bargain with the Union which, at the time of the refusal to bargain, had been the designated representative of a majority of the employees.[24] See, *e.g., Franks Bros Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847–848 (C.A. 9); *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, 394 F. 2d 711, 713 (C.A. 5); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.[25]

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[24] The Board also held that, even in the absence of the refusal to bargain violation, a bargaining order would have been necessary and appropriate to repair the unlawful effect of the Company's other unfair labor practices on the Union's previous valid majority (R. 198). It is well established that, where an employer engages in conduct violative of Section 8(a)(1) or other provisions which destroy a union's valid majority, the Board may appropriately enter a bargaining order remedy, irrespective of whether a Section 8(a)(5) violation could also be found. See, *e.g., J. C. Penney Co., Inc.* v. *National Labor Relations Board*, 384 F. 2d 479, 485–486 (C.A. 10); *United Steelworkers* v. *National Labor Relations Board*, 376 F. 2d 770, 772 (C.A.D.C.), certiorari denied *sub nom. Northwest Engineering Co.* v. *National Labor Relations Board*, 389 U.S. 932.

[25] *Amalgamated Clothing Workers* v. *National Labor Relations Board* (*Henry I. Siegel Co.*), 70 LRRM 2207 (C.A.D.C.), and *National Labor Relations Board* v. *Pembeck Oil Corp.*, 69 LRRM 2811 (C.A. 2), on which petitioner relies (Br. 94), are

Contrary to petitioner's contention (Br. 87–92), the record supports the findings on which the bargaining order rests. President Sinclair showered the employees with what amounted to threats that, if they selected the Union, the Company would be likely to close the plant or transfer its operations elsewhere. The Board could reasonably conclude that such threats, communicated by a man who shared the power to implement them, chilled employee support for the Union and thus contributed to the subsequent reduction in the Union's substantial majority (11 of 14 employees); and that, in these circumstances, a rerun election would provide nothing more than another reflection of unlawfully influenced employee sentiment.[26] It was not necessary for the Board to adduce further proof; the Board can properly draw reasonable inferences from the evidential facts. *See Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800.[27]

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both contrary to this well settled authority. But the District of Columbia Circuit has vacated the *Clothing Workers* opinion and ordered the case to be reheard *en banc;* the question whether to petition for a writ of certiorari in *Pembeck* is presently under consideration.

[26] See, *e.g.*, *Independent, Inc.* v. *National Labor Relations Board*, 70 LRRM 2413, 2416 (C.A. 5); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 905 (C.A. 2), certiorari denied, 348 U.S. 964; *National Labor Relations Board* v. *Frank C. Varney Co., Inc.*, 359 F. 2d 774, 775 (C.A. 3); *National Labor Relations Board* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 347 (C.A. 6); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.

[27] Petitioner errs in asserting (Br. 92) that any violation of Section 8(a)(1) automatically leads the Board to find that a refusal to bargain was not based on a good faith doubt as

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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to majority and to enter a bargaining order. As shown in our brief in *Gissel*, p. 22, n. 20, the Board will find an unlawful refusal to bargain and enter a bargaining order only where, as here, the violation of Section 8(a)(1) is substantial enough to warrant the conclusion that it contributed to the loss of majority and precludes a fair election.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * *

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